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IN THE

Supreme Court of the United States

STANLEY BOIM, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID BOIM, DECEASED, AND JOYCE BOIM,
Petitioners,

v.

MUHAMMAD ABDUL HAMID KHALIL SALAH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

THE SEVENTH CIRCUIT'S DECISION APPLIED THE *CENTRAL BANK* HOLDING TO ANTI-TERRORISM LEGISLATION

Respondent challenges our statement of the Question Presented on the ground that the decision of the Seventh Circuit "never definitively reached the question." Brief in Opposition, p. i. In fact, it is

clear to any reader of the sixth through tenth paragraphs of the Seventh Circuit's opinion (beginning with "Section 2333 . . ." through the paragraph that begins "To read secondary liability into section 2333(a) . . ."; Pet. App. A, pp. 4a-6a) that the court below applied the rule of *Central Bank* to this case and rejected the legal theory that had been approved by the district court and by the two panel opinions. Indeed, had the Seventh Circuit not determined that there could not be aiding-and-abetting liability under Section 2333, it would not have instructed, as it did (Pet. App. A, p. 41a), that the judgment regarding respondent Salah be "reversed with instructions to enter judgment in his favor." If secondary liability were conceivably available under Section 2333, the judgment against respondent Salah would have been affirmed on that ground or, at the very least, the case against him would have been remanded for further proceedings.

II.

THERE IS A CONFLICT BETWEEN THE SEVENTH AND SECOND CIRCUITS AND THE LEGAL ISSUE IS IMPORTANT

Respondent cites several cases in which the rule of *Central Bank* has been applied to statutes authorizing civil actions in regulatory areas where the primary tortfeasor has engaged in conduct that is *malum prohibitum* and not *malum in se*. The rule of *Central Bank* may, indeed, be applicable to violations of federal statutes such as the Electronic Communications Privacy Act, the Stored Wire and

Electronic Communications and Transactional Records Access Act, and the Contraband Cigarette Trafficking Act. *See* Brief in Opposition, p. 8.

But no federal appellate decision before the Seventh Circuit's ruling in this case applied *Central Bank* to federal anti-terrorism law. Those who aid and abet organizations that engage in murder and other forms of violence against civilian populations are, we submit, in a very different posture than aiders and abettors of trafficking in contraband cigarettes. Respondent acknowledges that the Second Circuit in *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd sub nom. American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008), permitted a claim under a federal anti-terrorism statute to proceed on an aiding-and-abetting theory. That ruling conflicts with the decision of the Seventh Circuit in this case. District Courts in the Central District of California and in the Eastern District of New York have also followed the same course in terrorism cases. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1171 (C.D. Cal. 2005); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005); *Stutts v. De Dietrich Group*, No. 03-CV-4058, 2006 WL 1867060 (E.D.N.Y. June 30, 2006).

Moreover, the governing legal issue – whether civil liability may be imposed against secondary tortfeasors who aid and abet conduct prohibited by federal law with respect to terrorist organizations – is an important question. It potentially affects the entire network of federal laws that deter conduct

within the United States that promotes international terrorism. There is no reason whatever to narrow the scope of these laws and to shield against civil liability persons or organizations that engage in various forms of secondary conduct that would qualify for civil liability under common-law aiding-and-abetting and conspiracy law.

The legal issue presented by this petition is not, as the respondent asserts, "unique and . . . limited in its practical import." Brief in Opposition, p. 11. When the case was first appealed to the Seventh Circuit, the United States was asked to file a brief *amicus curiae* and its brief supported petitioners' position that there was aiding-and-abetting liability under Section 2333. Although the legal issue arises in a unique and distinctive context, it has broad ramifications.

III.

THIS IS AN APPROPRIATE COMPANION CASE TO *HOLDER v. HUMANITARIAN LAW PROJECT*, Nos. 08-1498, 09-89

On September 30, 2009, the Court granted certiorari in *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89. The issue in that case is whether the terms "service," "training," and "expert advice or assistance" in 18 U.S.C. § 2339B(a)(1) are unconstitutionally vague and must, therefore, be read out of the applicable anti-terrorism law. The issue presented by this case should be heard and decided by the Court in tandem with the

Humanitarian Law Project case for at least two reasons:

First, if a majority of this Court were to agree with the Ninth Circuit's decision that those who assist a foreign terrorist organization with service, training, expert advice or assistance cannot constitutionally be held liable under Section 2339B(a)(1) because the statutory terms are too vague, the issue presented in this case would come to the fore. May such individuals or organizations (who must be shown, in any event, under 18 U.S.C. § 2339B(a)(1) to "have knowledge that the organization . . . has engaged or engages in terrorist activity") be held liable as aiders and abettors or co-conspirators?

Second, if a majority of this Court were to reverse the decision of the Ninth Circuit in the *Humanitarian Law Project* case, the aiding-and-abetting issue would remain important. Are individuals or organizations that do not themselves provide the kinds of assistance enumerated in Section 2339B(a)(1) but aid and abet such conduct by others liable under federal law? Does the rule of *Central Bank* apply to the conduct specified in the amendment to Section 2339B(a)(1) by the 2004 Intelligence Reform and Terrorism Prevention Act? To be sure, that Section now prescribes a severe criminal penalty for anyone who "conspires" to provide material support or resources, but it is not clear from the statutory language whether there is civil liability for acts that constitute aiding-and-abetting.

IV.

THE MEANING OF ANTI-TERRORISM LEGISLATION IS NOT A SUBJECT TO WHICH THIS COURT SHOULD APPLY ITS USUAL RULES REGARDING CIRCUIT CONFLICTS

Respondent argues that certiorari should be denied at this time because "the prudent path is to allow other circuits to issue opinions on the matter, and then discern whether there is even a conflict to resolve." Brief in Opposition, pp. 7-8. There is, as we have noted, already a conflict between the Second and Seventh Circuits. In any event, the subject-matter is not one that warrants recourse to this Court's usual "prudent path" of awaiting decisions by various courts of appeals before considering the legal issue.

Anti-terrorism legislation is enacted to deter conduct in the United States that may facilitate the commission of grievous international offenses and the recurrence anywhere in the world of the historic crime of 9/11. Delay in resolving critical legal issues that affect the deterrent impact of federal legislation in this area just so that this Court will have the benefit of views of various lower-court federal judges is simply inappropriate and dangerous. The "prudent path" that this Court may follow when legal issues concern less urgent federal programs should not be invoked to delay resolution of the issue presented by this case. Its disposition might well deter an aider-and-abettor who would, so long as the legal issue of his liability is unresolved, choose to assist a terrorist

organization and thereby contribute to the commission of an act of violence that harms civilians.

V.

RESPONDENT'S COMPLICITY IN HAMAS MURDER AND VIOLENCE HAS BEEN CONCLUSIVELY ESTABLISHED

In a patent effort to portray the respondent as a victim -- rather than the major perpetrator of international terrorism that he truly is -- the Brief in Opposition sets out in great length respondent's false and discredited allegations of mistreatment and coercion after he was arrested in Israel. Brief in Opposition, pp. 3-6. These same fabricated assertions were heard and rejected following a 13-day hearing in *United States v. Marzook*, 435 F. Supp. 2d 708, 777 (N.D. Ill. 2006), and they were refuted during a deposition of respondent's Israeli counsel in this case. In his briefs in the court of appeals respondent acknowledged that, notwithstanding assertions he had made of coercion by Israeli authorities, he was "not in a position to dispute" the district court's findings of his substantial assistance to Hamas. Brief and Appendix of Defendant-Appellant Muhammad Salah, pp. 13-14, fn. 8 & 9.

Rather than testify during discovery in this case, respondent invoked his privilege against self-incrimination. In a supplemental brief filed in the court below after en banc rehearing had been

granted, respondent acknowledged that "[b]ecause Salah invoked his right against self-incrimination, the Boims were entitled to a negative inference against him regarding his conduct and intent" so that "it is presumed for purposes of this appeal that Salah contributed money to Hamas in January 1993 for the express purpose of furthering its violent activities." Defendant-Appellant Muhammad Salah's Supplemental Brief for Rehearing *En Banc*, pp. 4-5.

Respondent was, in fact, convicted after a jury trial in federal court of having committed obstruction of justice in this case by submitting false answers to the petitioners' interrogatories. Although we acknowledge that the injustice of the Seventh Circuit's decision freeing him of liability to the petitioners for the murder of their son is not, standing alone, a reason to grant our petition for certiorari, this Court should not be misled into believing that it has before it a person with clean hands.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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